Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1729

In The

Supreme Court of the United States

October Term, 1996

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, JENNIFER KNISKERN, & FELINA CAVALIERE; GUY CAVALIERE; JOANNA CAVALIERE & MARIA CAVALIERE, Minors, By and Through Their Father and Natural Guardian, GUY CAVALIERE, ALLSTATE INSURANCE COMPANY,

Petitioners,

vs.

THE TOWNSHIP OF SOMERFORD, TRUSTEES: WALTER BETHEL, DAVID DAHUME, JAMES MORAN; THE COUNTY OF MADISON, COMMISSIONERS: HERBERT C. MARKLEY, ROBERT EDWARDS, JOE D. YODER, NINO CAVALIERE, WESTERN RESERVE MUTUAL CASUALTY INSURANCE CO., THE STATE OF OHIO, THE STATE OF OHIO DEPARTMENT OF TRANSPORTATION (ODOT),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

PATRICK S. CORRIGAN
Counsel of Record for Respondent,
Board of Commissioners of Madison County
633 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114
(216) 696-6454

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE AFFILIATION

Respondent, Board of Commissioners of Madison County is a political subdivision of the State of Ohio.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF IN OPPOSITION..... 1

STATEMENT OF JURISDICTION..... 1

RULES INVOLVED 1

STATEMENT OF THE CASE..... 2

I. Course of Proceedings and Disposition of the Case Below 2

II. Correction of Misstatements in the Petition .. 3

REASONS FOR DENYING THE WRIT 4

I. This Court has no jurisdiction to consider most of Petitioner's arguments 4

II. The Tenth District Court of Appeal's affirmance of Summary Judgment and the denial of the Petition for Writ of Certiorari to the Ohio Supreme Court follow well-settled principles and further the purpose underlying Rule 56 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 8

Bacon v. Daniels, 37 Ohio St. 279 (1881) 5

Beck v. Washington, 369 U.S. 541 (1962) 5

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 7, 8

C.E. Morris Co. v. Foley Constr. Co., 54 Ohio St. 2d 279, 376 N.E. 2d 578 (1978) 7

Graber Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) 6

Herndon v. Georgia, 295 U.S. 441 (1935) 5

Kalish v. Trans World Airlines, Inc., 50 Ohio State 2d 73, 362 N.E. 2d 994 (1977) 5

Mitseff v. Wheeler, 38 Ohio St. 3d 112, 526 N.E. 2d 798 (1988) 7

Remley v. Cincinnati Metro. Hous. Auth., 99 Ohio App. 3d, 573, 651 N.E. 2d 450 (1994) 5

Turner v. Turner, 67 Ohio St. 3d 337, 617 N.E. 2d 1123 (1993) 8

Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St. 3d 108, 570 N.E. 2d 1095 (1991) 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 4

Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES CITED:

28 U.S.C. §1257 ..... 1, 5

23 U.S.C. §101-103 6

O.R.C. §2744.02 (B)(3) 8

RULES CITED:

Supreme Court Rule 15.1 3

Ohio Rules of Civil Procedure 56 [C] 2, 7

RESPONDENTS' BRIEF IN OPPOSITION

The Respondent, Board of Commissioners, Madison County, requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision dated December 20, 1996, of the Ohio Supreme Court.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257 (a). The questions presented for review in the petition were never presented to the Ohio courts. These newly presented arguments may not properly be considered.

RULES INVOLVED

In addition to the rules cited by the Petitioner, the following rule is relevant.

> "The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in the rule. A summary judgment shall not be rendered unless it appears from

> such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56 [C] of the Ohio Rules of Civil Procedure.

STATEMENT OF THE CASE

Respondent, Board of Commissioners of Madison County, respectfully opposes the Petition for Writ of Certiorari. The petition assails the Ohio judiciary for granting and affirming summary judgment, despite the utter failure of the Petitioner to present evidence sufficient to create an issue of fact. The Petitioner failed to raise at the trial court level the constitutional issues set forth in the Petition, and decries statutes enacted long after judgment was rendered.

I. Course of Proceedings and Disposition of the Case Below.

Petitioner on June 23, 1994 filed a Complaint in the Cuyahoga County Court of Common Pleas against Respondent Madison County Board of Commissioners,

alleging that the deaths and injuries sustained on Interstate 70 in Madison County, Ohio were the result of the failure of Respondents to properly maintain the guardrails and fencing on the interstate. Respondent Board of Commissioners of Madison County filed a Third Party Complaint against the Ohio Department of Transportation seeking indemnity and contribution. On February 23, 1995, Respondent removed the case to the Ohio Court of Claims, which has jurisdiction over claims against the Ohio Department of Transportation. The Court of Claims granted the Motions for Summary Judgment of all Respondents on August 15, 1995.

The Petitioner appealed to the Tenth District Court of Appeals, Franklin County, Ohio, which affirmed the Trial Court. Petitioner then on July 19, 1996, petitioned for review by the Ohio Supreme Court. The Ohio Supreme Court declined jurisdiction, and on January 29, 1997, denied Petitioner's Motion for Reconsideration.

II. Corrections of Misstatements in the Petition.

Pursuant to the United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the petition to the Court's attention.

In his first reason for granting certiorari, Petitioner improperly asserts that the Ohio Supreme Court and the Ohio Court of Appeals decided and created federal constitutional questions under the Fourteenth Amendment of the Constitution of the United States as well as state constitutional questions. The Court of Appeals merely reviewed a decision granting summary judgment in favor

of Respondent. The Record is devoid of references to the United States Constitution and the Ohio Constitution, and no constitutional questions were raised in the pleadings.

Petitioner incorrectly asserts that the State of Ohio delegated its highway maintenance duties to the Madison County Board of Commissioners. Petitioner failed to present any evidence showing that the Board of Commissioners had assumed or been delegated a duty or responsibility to maintain any portion of the interstate highway involved in the case. Uncontroverted evidence proved that the Board of Commissioners of Madison County had no duty to maintain the site at which the accident occurred.

Petitioner's most astounding misstatement in the Petition is the argument that Ohio Amended House Bill No. 350, effective as of January 27, 1997 is somehow applicable to this case. Without question, the legislation is inapplicable, since it was drafted and enacted long after summary judgment was granted.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the State court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28

U.S.C. §1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in State court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal).

Ohio law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals. *Bacon v. Daniels*, 37 Ohio St. 279 (1881). A party having elected to proceed without raising a federal cause of action, may not assert on appeal the federal cause of action not considered by the Courts below. *Kalish v. Trans World Airlines, Inc.*, 50 Ohio State 2d. 73, 362 N.E. 2d. 994 (1977). The failure to challenge the constitutionality of a statute at the trial court level constitutes waiver of the claim. *Remley v. Cincinnati Metro. Hous. Auth.*, 99 Ohio App. 3rd 573, 651 N.E. 2d 450 (1994). Likewise, grounds of error not raised by assignment of error or argument in the court of appeals cannot be reviewed by the Ohio Supreme Court.

In this Court, for the first time, Petitioner argues that he has been denied substantive and procedural due process rights. Petitioner makes this argument apparently since the doctrine of sovereign immunity was applied and, further, apparently since the doctrine was applied in the Court of Claims, in which claims against the State of Ohio are exclusively adjudicated. Petitioner never cited the Fifth and Fourteenth Amendments to the United States Constitution, Section 16, Article IV of the Bill of Rights under the Ohio Constitution or Section 2, Article IV of the Ohio Constitution in his case below.

Petitioner perilously relies on the reference to 23 U.S.C. §101-103 in an expert affidavit as grounds for presenting a federal question below. Petitioner boldly questions the validity of the Ohio Court of Claims, the statutes governing sovereign immunity, and, incredibly, legislation which was enacted long after his case was ruled upon. Elementary law dictates that the validity of state law may only be drawn in question by objections properly asserted in the courts below, and that this Court has a duty to decline jurisdiction when it appears that the constitutional question presented is not substantial in character. *Zucht v. King,* 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922). The petition fails to account for the requirements for review in this Court.

The decisions of the trial court and the court of appeals rest largely on the Petitioner's lack of evidence. A finding of no evidence by a state trial court, which is affirmed on appeal, presents no issue deserving of this Court's attention. *See Graber Tank & Mfg. Co. v. Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949), *reh'g granted,* 337 U.S. 910 (1949), *adhered to in part, reversed in part,* 339 U.S. 605 (1950) ("A court of laws, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."). Petitioner clearly lacks the requisite grounds for review in the United States Supreme Court.

II. THE TENTH DISTRICT COURT OF APPEALS AFFIRMANCE OF SUMMARY JUDGMENT AND THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT FOLLOW WELL-SETTLED PRINCIPLES AND FURTHER THE PURPOSE UNDERLYING RULE 56.

The opinion of the Tenth District Court of Appeals and the Ohio Supreme Court's denial of the Petition for Writ of Certiorari are consistent with established case law. The trial court applied Rule 56 of the Ohio Rules of Civil Procedure, and found no question of material fact sufficient to send the case to trial. The Court of Appeals eschewed the obfuscation in the assignments of error presented by the Petitioner, and reviewed the trial court's ruling in accordance with the proper standard of review for summary judgment.

Ohio has adopted the summary judgment standard set forth by the United States Supreme Court. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be revised by a reviewing court as being against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, 376 N.E. 2d 578 (1978). The Court of Appeals followed the Standard set forth by this Court as adopted by the Ohio Courts.

"Under Civ. R. 56 [C], the party seeking summary judgment has the initial burden to identify those elements of the nonmoving party's case which do not raise genuine issues of material fact and upon which the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 114-115, 526

N.E. 2d 798, 801 (1988). When the moving party satisfies its burden, the nonmoving party cannot rest on the allegations in the pleadings, but has a "reciprocal burden" to set forth specific facts demonstrating that there is a "triable issue of fact." *Id.* at 115-116, 526 N.E. 2d at 801; *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108, 570 N.E. 2d 1095 (1991), paragraph three of the syllabus (approving and following *Celotex, supra*).

Because the standard for summary judgment mirrors the standard for a directed verdict, the evidentiary material must establish that the nonmoving party's claim is more than simply colorable. *Celotex, supra*, 477 U.S. at 323, 106 S. Ct. at 2552, 91 L. Ed. 2d at 273-274. Whether a genuine issue of material fact exists depends on whether the evidence presents "a sufficient disagreement to require submission to a jury" or whether it is so "one-sided that one party must prevail as a matter of law." *Turner v. Turner*, 67 Ohio St. 3d 337, 340, 617 N.E. 2d 1123, 1126 (1993) (citing *Anderson v. Liberty Lobby, Inc.*), 477 U.S. 242, 251-252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 213-214 (1986).

The Court of Appeals found that the "Guardrail was not a nuisance under R.C. 2744.02 (B)(3), as a matter of law". *See*, Court of Appeals decision, A 20. Further, the Court properly stated that "Although plaintiffs claim that other sections of the Revised Code place a duty upon the county. . . . (Petitioners) have not identified any section of the Revised Code which even arguably imposes liability upon either the county or township. . . . " *See*, Court of Appeals decision, A 22. The reviewing Court examined the evidence *de novo*, and affirmed the trial court.

The Petitioner failed to interpose a shred of evidence that Respondents had a duty to Petitioner or that Respondent was somehow the proximate cause of the terrible accident. Given the absence of evidence, this matter was properly disposed of by the Ohio Courts, and does not merit review in this forum.

CONCLUSION

Petitioner's failure to raise constitutional and federal issues below, and the absence of sufficient reason to review the well settled law of the State of Ohio warrants the denial of the writ of certiorari.

Respectfully submitted,

PATRICK S. CORRIGAN
Counsel of Record for Respondent, Madison County Board of Commissioners
BERLON & TIMMEL
526 Superior Avenue, N.E.
633 Leader Building
Cleveland, Ohio 44114
(216) 696-6454